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No. 85-221

In the Supreme Court of the United States

OCTOBER TERM, 1985

HERBERT O. JENSEN, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that 42 U.S.C. (Supp. I) 402(x)(1), which suspends payment of social security benefits to incarcerated felons who are not participating in approved rehabilitation programs, constitutes a bill of attainder and ex post facto law under Article I, Section 9, Clause 3 of the Constitution and violates his due process and equal protection rights under the Fifth Amendment to the Constitution.

1. In 1974, after two heart attacks, petitioner began receiving social security disability benefits under 42 U.S.C. 423(a)(1). In 1977, petitioner was convicted of second degree murder and was sentenced to serve 30 years in the North Dakota State Penitentiary, where he is still incarcerated. In 1980, Congress amended the Social Security Act to require that no disability benefits be paid to any individual "for any month during which such individual is confined

in a jail, prison, or other penal institution or correctional facility, pursuant to his conviction of an offense which constituted a felony under applicable law, unless such individual is actively and satisfactorily participating in [an approved] rehabilitation program." Pub. L. No. 94-473, § 5(c), 94 Stat. 2265 (codified at 42 U.S.C. 423(f)(1) (repealed 1983)). In 1983, Congress reenacted this provision as Section 402(x)(1) of Title 42, and expanded it to cover recipients of old age benefits in addition to disability benefits. Pub. L. No. 98-21, § 339, 97 Stat. 133.

After being notified that his disability benefits were being suspended as of the effective date of Pub. L. No. 94-473 during his incarceration, petitioner filed the instant action in the United States District Court for the District of North Dakota, contending that the statute violated his constitutional rights of due process and equal protection and constituted an ex post facto law and bill of attainder. The district court dismissed the complaint for petitioner's failure to exhaust his administrative remedies, but the court of appeals reversed and remanded for further proceedings, finding that petitioner's challenge to the statute was collateral to his substantive claim of entitlement and presented a colorable constitutional challenge within the meaning of this Court's decision in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). *Jensen* v. *Schweiker,* 709 F.2d 1227, 1229-1231 (8th Cir. 1983).

On remand, the district court determined that petitioner's constitutional claims were without merit (Pet. 6-7; Pet. App. 5a). In a per curiam opinion (Pet. App. 1a-12a), the court of appeals affirmed. The court evaluated petitioner's due process and equal protection claims by determining whether " 'the statute manifests a patently arbitrary classification, utterly lacking in rational justification' "(*id.* at 6a, quoting *Flemming* v. *Nestor,* 363 U.S. 603, 611 (1960)). The court found that "the suspension of benefits to

incarcerated felons who are not participating in an approved rehabilitation program is rationally related to the Social Security Act's policy of compensating for a loss of earnings without providing a disincentive for rehabilitation" (Pet. App. 6a-7a); the court also concluded that "Congress had another permissible purpose in enacting the statute which was to avoid discipline problems which cash payments to inmates would create" (*id.* at 8a (citations omitted)).

Next, the court of appeals dismissed petitioner's ex post facto and bill of attainder claims (Pet. App. 9a-11a). Again relying on this Court's decision in *Flemming*, 363 U.S. at 617, the court of appeals held that "the suspension of a noncontractual benefit [such as petitioner's disability benefits] cannot be considered a punishment" (Pet. App. 10a). Although suggesting that there was "some indication" that Congress may have been motivated in part by punitive aims, the court concluded that Congress also had rational nonpunitive reasons for enacting this provision and that it would not " ' "reject all those alternatives * * * save that one which might require invalidation of the statute" ' " (*id.* at 11a, quoting *Pace* v. *United States*, 585 F. Supp. 399, 401 (S.D. Tex. 1984), and *Flemming*, 363 U.S. at 621)).

2. The opinion of the court of appeals is plainly correct and does not warrant further review by this Court.

Petitioner does not appear to argue that the court of appeals' decision is inconsistent with the decisions of this Court or any other court of appeals. It is not: it follows the decisions of this Court in *Flemming* v. *Nestor*, *supra*, and *Schweiker* v. *Wilson*, 450 U.S. 221 (1981), and is in accord with the decisions of every lower court that has considered similar challenges by prisoners to the same statute and its predecessor. *Jones* v. *Heckler*, No. 84-1598 (10th Cir. Oct. 1, 1985); *Buccheri-Bianca* v. *Heckler*, 768 F.2d 1152 (10th

Cir. 1985); *Washington* v. *Secretary of HHS,* 718 F.2d 608 (3d Cir. 1983); *Pace* v. *United States,* 585 F. Supp. 399 (S.D. Tex. 1984); *Hopper* v. *Schweiker,* 596 F. Supp. 689 (M.D. Tenn. 1984).

As the court of appeals correctly recognized (Pet. App. 9a), the ex post facto and bill of attainder clauses of the Constitution were designed to prohibit certain legislatively inflicted (as opposed to judicially determined) punishments. To constitute an ex post facto law, a statute must " 'impose[] a punishment for an act which was not punishable at the time it was committed; or [must] impose[] additional punishment to that then prescribed.' " *Weaver* v. *Graham,* 450 U.S. 24, 28 (1981), quoting *Cummings* v. *Missouri,* 71 U.S. (4 Wall.) 277, 325-326 (1867). Similarly, a bill of attainder is a law "that legislatively determines guilt and inflicts punishment * * * without provision of the protections of a judicial trial." *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 468-469 (1977).

The critical question here on the ex post facto and bill of attainder claims, then, is whether the legislation imposes "punishment." See *Flemming* v. *Nestor,* 363 U.S. at 613. In *Flemming,* this Court rejected the contention that Section 202(n) of the Social Security Act (42 U.S.C. 402(n)), which provides for termination of social security benefits to certain deported aliens, constituted an ex post facto law or bill of attainder. The Court said: "Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected." 363 U.S. at 614. In other words, if " 'the restriction of the individual comes about as a relevant incident to a regulation of a present situation,' " it is not punishment. *Ibid.* (quoting *De Veau* v. *Braisted,* 363 U.S. 144, 160

(1960) (plurality opinion)). The statute at issue in *Flemming*, this Court pointed out, did not impose an "affirmative disability or restraint" but rather constituted "the mere denial of a noncontractual governmental benefit." 363 U.S. at 617. In such a situation, "only the clearest proof [of punitive intent] could suffice to establish the unconstitutionality of a statute * * *." *Ibid.*

The present case is directly analogous. As the court of appeals recognized, Congress's motives for enacting this statute were in fact to deny payments to those who no longer needed them and to ameliorate the disciplinary problems such payments to prisoners created—not to punish. See S. Rep. 96-987, 96th Cong., 2d Sess. 8 (1980); *Receipt of Social Security Benefits by Persons Incarcerated in Penal Institutions: Hearings Before Subcomm. on Social Security of House Comm. on Ways and Means*, 96th Cong., 2d Sess. 25, 64, 68, 75 (1980); *Washington* v. *Secretary of HHS*, 718 F.2d at 610-611; *Pace* v. *United States*, 585 F. Supp. at 401.[1]

Petitioner's due process and equal protection claims are equally ill-founded.[2] As set forth in *Flemming*, the applicable test for measuring these claims is whether "the statute

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[1]The court of appeals said it found "some indication" that Congress *in part* intended the statute to be punitive (Pet. App. 10a). Assuming, arguendo, such an indication, the limited legislative history in this regard falls far short of the "unmistakable evidence of punitive intent which * * * is required before a Congressional enactment of this kind may be struck down." *Flemming*, 363 U.S. at 619. In any event, where a rational nonpunitive justification exists—and certainly where, as here, it is explicitly embodied in the legislative history—this Court is not required to "reject all those alternatives which imaginativeness can bring to mind, save that one which might require the invalidation of the statute." *Id.* at 621.

[2]Petitioner cites manifold examples of what he contends to be unequal treatment between himself and those in other allegedly relevant classes of recipients of public (and private) benefits (Pet. 13-22). Without parsing the questionable relevance (and accuracy) of these

manifests a patently arbitrary classification, utterly lacking in rational justification." 363 U.S. at 611. As just discussed, the legislative history of this statute amply demonstrates congressional concern that a basic purpose of the social security program—that is, to provide a continuing source of income to those whose earnings are cut off as a result of severe disability—was not being served by payments to individuals being maintained at public expense in prison; the legislative history also demonstrates Congress's concern that cash payments to prisoners were creating disciplinary problems within prisons. Either of these concerns constitutes a rational justification for the statute. See, *e.g.*, *Richardson* v. *Belcher*, 404 U.S. 78, 82-84 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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examples, we note simply that a classification " 'does not offend the Constitution simply because [it] "is not made with mathematical nicety or because in practice it results in some inequality" ' " (*Idaho Department of Employment* v. *Smith*, 434 U.S. 100, 101 (1977), quoting *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)) and that "it is, of course, constitutionally irrelevant * * * that the section does not extend to all to whom the postulated rationale [of the statute] might in logic apply." *Flemming*, 363 U.S. at 612 (footnote omitted). See also *Schweiker* v. *Wilson*, 450 U.S. 221 (1981).